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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re S.B., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

S.B.,

Defendant and Appellant.

A122798

(Contra Costa County
Super. Ct. No. J07-00906)

S.B.,¹ a minor, contends that the trial court erred in denying her motion to exclude evidence of the victim’s identification because a video shown to the victim was unduly suggestive, thus making the identification procedure unreliable and prejudicial. We affirm.

FACTS AND PROCEDURAL HISTORY

A delinquency petition (Welf. & Inst. Code, § 602, subd. (a)) was filed by the Contra Costa County District Attorney’s Office alleging that appellant committed attempted second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c), 664). Following a contested jurisdictional hearing, the court sustained the petition finding true the allegation that S.B. had committed attempted second degree robbery.

¹ Because the minor has a unique first name, we refer to her by initials only to protect her privacy.

The court adjudged appellant a ward of the court and placed her on probation in the custody of her mother, subject to various terms and conditions.

The petition alleged that at about 9:30 p.m. one evening in November 2006, Francine Austin was walking toward the Del Norte BART station in El Cerrito carrying a shopping bag filled with recent purchases, receipts, and cash. As Austin proceeded down a pathway past the Target parking lot, she saw a “slim . . . young girl,” wearing a light green jacket, pull her “tannish” fur-lined hood over her head. Austin became suspicious because “it was not that cold,” and “thought that [it] seem[ed] like someone [was] trying to hide [herself].”

The girl walked toward Austin and attempted to take Austin’s bag as she passed. Austin warned, “I’m going to fight you for my bag.” The bag ripped during the struggle between Austin and the girl, spilling the contents to the ground. The girl then “pull[ed] back her hood” and Austin saw a “gorgeous girl” with a “beautiful face” take up a “fighting stance. . . .” As they boxed, the girl backed away twice and finally retreated.

A male youth, later identified as V.B.H., approached Austin from behind, punched Austin in the kidney and stood between Austin and the girl. A second larger male appeared and stood approximately 15 feet away from the others. The girl searched the contents of the torn bag that were strewn on the ground, but did not find the cash hidden among the other items. Austin then shouted “fire,” and all three suspects fled. Austin immediately ran to the BART station and reported the attack.

Although it was dark when Austin was attacked, the entire path where the incident occurred was illuminated. Additional lighting was provided by the Target parking lot and a street lamp near the BART station. Austin was able to see that her female assailant was “African-American,” 13 to 16 years old, about Austin’s height (approximately five feet, six inches) “or a little taller,” “gorgeous,” with a “beautiful face.” Regarding the girl’s clothing, Austin saw that she wore a light green jacket, with a tan fur lining around the hood, light-colored jeans and bright tennis shoes.

El Cerrito Police Officer Lane Matsui accompanied Austin back to the scene of the attack where the contents of her bag were scattered. The officer then escorted Austin

to a nearby Denny's restaurant and then back to a bus stop near the BART station,² where two individuals were being held for separate in-field showups. Prior to each showup, Officer Matsui read instructions to Austin from his Contra Costa County admonishment card.³ Austin was unable to positively identify anyone at either location.

At the suggestion of Austin's brother, himself a BART police officer, Officer Matsui escorted Austin to Atlas Liquors, located a short distance from Target, to ascertain whether her perpetrators had been in the store and had been filmed by the liquor store's surveillance camera. Austin was shown a video that was filmed between 9:00 and 9:30 p.m., about one hour before she viewed it.

Austin identified three persons depicted on the video as the perpetrators, stating "those [are] the people." These individuals included appellant and V.B.H.

Prior to trial, the defense filed a motion to suppress identification evidence on due process grounds. Appellant argued that the identification procedure was so "unduly suggestive" as to make both the prehearing video identification and subsequent in-court identification unreliable.

After hearing argument from counsel, witness testimony, and reviewing the video allegedly depicting appellant, the trial court rejected appellant's claim and ruled that appellant had not met her burden of showing that the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." This appeal followed.

² Officer Matsui testified that this identification took place "on Potrero and the BART path[, p]ossibly a bus stop [*sic*]."

³ Although the Contra Costa County admonishment card itself was not admitted into evidence below, Officer Matsui testified that generally the admonition includes a warning that "just because [a person is] with the police, it does not necessarily mean they are guilty or innocent." It also warned that it "is just as important to let innocent people go as to accuse people of things they had done."

DISCUSSION

Appellant contends her due process rights were violated when the trial court denied her pretrial motion to exclude Austin's prehearing and in-court identification evidence.

A violation of due process occurs only if the identification procedure is so unduly suggestive as to create a substantial likelihood of irreparable identification. (*Simmons v. United States* (1968) 390 U.S. 377, 384.) In determining whether the admission of identification evidence violates appellant's right to due process of law, we consider:

"(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*)). "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable. [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citation.]" (*Cunningham, supra*, 25 Cal.4th at p. 989.) "The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him [or her].' [Citation.]" (*Id.* at p. 990.) The defendant has the burden of showing unfairness as a "demonstrable reality, not just speculation. [Citation.]" (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

We apply de novo review by examining independently "a trial court's ruling that a pretrial identification procedure was not unduly suggestive. . . ." (*People v. Avila* (2009) 46 Cal.4th 680, 698-699, citing *People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

A. Suggestiveness

Appellant argues the police conduct was improper because Austin's identification of appellant was guided by "Officer Matsui's suggestion that the suspects had been identified at Atlas Liquor[s] earlier in the evening, and the security camera video likely captured their images on film." Appellant claims that the officer's suggestion left Austin with the "insinuation that the guilty parties would appear in . . . the video shown to her."

We disagree. The circumstances do not compel the conclusion that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Prior to reaching Atlas Liquors, Officer Matsui informed Austin that “police had developed information that the possible suspects she encountered *may* have been in the liquor store.” (Italics added.) Austin’s brother, a BART police officer, merely “suggested that [they] go into the liquor store because [the store] has a surveillance camera and the kids *may* have gone in there.” (Italics added.) Further, the record shows Austin was left with the “assumption . . . that there *might* have been an image of people matching the description of [her assailants] that night” and it was a “*possib[ility]* the person[s] could have come in either immediately after or immediately before this [attempted robbery] had taken place.” (Italics added.) Significantly, there is no evidence in the record that police knew the suspects had gone into the store before they asked Austin to review the security camera video, and thus there is no evidence police informed Austin her assailants were on the video.

Furthermore, although Austin was not admonished prior to the video identification procedure, police admonished her regarding in-field identifications prior to each in-field showup within the previous hour.

Appellant’s reliance on *People v. Nation* (1980) 26 Cal.3d 169 (Nation) is misplaced. There, three young girls were approached by a man who attempted to rape one of them. The girls went to the police station approximately two weeks after the crime to view a photographic lineup in an attempt to identify a suspect. (*Id.* at pp. 173-174.) The police made no effort to separate the girls to assure independent appraisals of the photographs. (*Id.* at pp. 179-180.) The defendant’s mug shot was initially selected by one of the girls, who then told the other two girls she had identified the assailant. At that time, the victim was considering another suspect’s photograph. All three girls then collectively agreed that the first’s girl’s selection was in fact the perpetrator. (*Id.* at p. 180.)

Once the defendant's mug shot had been selected, the police instructed the girls to take the picture home and show it to one of their mothers, who had reported that on the evening of the attack a man had made a lewd remark to her in the vicinity of where the crime occurred later that night. (*Nation, supra*, 26 Cal.3d at pp. 180, 174.) After retaining the photograph for at least a week, the girls showed the mother the single mug shot they had selected as the assailant, and she agreed it was the same man she had seen earlier. (*Id.* at p. 180.)

The *Nation* court concluded the identification procedure was extraordinary suggestive because the three girls' initial identification of the suspect was a product of mutual reinforcement of opinion among witnesses and police allowed the mother to be shown a photograph of a single individual whom she knew had been identified by the girls as the perpetrator of the crime. (*Nation, supra*, 26 Cal.3d at pp. 180-181.) This case is inapposite for several separate reasons.

Here, Austin was the only witness; hence mutual reinforcement of opinion among witnesses was not possible. Austin was not given a single photograph or told that the photograph had already been chosen by other witnesses. She was shown a video after police merely suggested to her that the suspects may have been in a nearby liquor store and captured on its video surveillance system.

Further, in contrast to *Nation, supra*, 26 Cal.3d at page 180, where the girls had possession of the photograph for at least a week, Austin never had possession of the video and only viewed it three times. Thus, unlike the witnesses in *Nation*, police procedures did not impermissibly suggest to Austin that the individuals on the video were her assailants.

We therefore independently conclude the video identification was not unduly suggestive. However, even if we found otherwise, we further conclude the identifications were reliable under the totality of the circumstances. (See *Manson v. Braithwaite* (1977) 432 U.S. 98, 116.)

B. Reliability

In deciding whether the identification was reliable under the totality of the circumstances, we consider the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated at the identification and the time between the crime and the identification. (*Cunningham, supra*, 25 Cal.4th at p. 989.)

The case of *People v. Huggins* (2006) 38 Cal.4th 175 is instructive on the reliability of an in-field showup. There, the California Supreme Court upheld the admission of an identification resulting from an in-field showup. In so doing, the court relied on the fact that there was only a short lapse of time between the crime and the showup, the suspect wore distinctive clothing which the victim had a good opportunity to view as her assailant fled the scene, and the victim without hesitation identified the defendant in court as her assailant. (*Id.* at p. 243.) The court held that these factors constituted sufficient indicia of reliability to make the identification evidence admissible. (*Ibid.*)

Here, as in *People v. Huggins, supra*, 38 Cal.4th at page 243, only a short amount of time (approximately one hour) had passed between the time of the attempted robbery of Austin and Austin's viewing of the surveillance video, when Austin's memory was fresh and clear. Moreover, the crime took place in a well-lit area. Austin's close attention to detail allowed her to note that her female assailant was African-American, 13 to 16 years old, about Austin's height (approximately five feet, six inches) or slightly taller, "gorgeous," with "a beautiful face." Appellant also wore distinctive clothing, which Austin was able to describe in detail, including a light green jacket with a tan fur lining around the hood, light-colored jeans and bright tennis shoes. Austin had an ample opportunity to view appellant's face when she dropped her hood during the struggle.

Furthermore, at the time of the identification Austin was certain and explained that her identification was based on appellant's fur-lined hood and pretty face. She identified the suspects both immediately and certainly upon her first viewing of the video, when she

stated “those [are] the people,” and again at trial. Analogous to *Huggins*, all of the same factors are present and constitute sufficient indicia of reliability.

After independently reviewing the record, we also find that the identification was reliable under the totality of the circumstances.

DISPOSITION

The judgment is affirmed.⁴

RUVOLO, P. J.

We concur:

SEPULVEDA, J.

RIVERA, J.

⁴ As the pretrial identification is not constitutionally infirm, the in-court identification could not have been tainted and is not subject to challenge. (*People v. Hernandez* (1970) 11 Cal.App.3d 481, 488.)